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Decree of Separate Maintenance Without Divorce

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DECREE OF SEPARATE MAINTENANCE WITHOUT DIVORCE

The question has often arisen in many jurisdictions as to whether or not a wife, who has grounds for a divorce and is wholly without means of support, can maintain an action against the husband for a reasonable allowance for the maintenance of herself, unless she couples this application with an application for divorce. This question will be discussed in this note with the purpose of determining what the law is and should be in relation to this question.

At the common law, where a separate maintenance was granted to the wife, it was usually incidental to some other relief, such as a divorce.[1] This rule seems to be based upon the fact that to give maintenance without divorce in effect prevents the parties from living together and puts a premium on the wife holding out against the husband.

However, the California Court, in the early decision of *Galland v. Galland*,[2] said that a wife, who without any cause or provocation is driven from her husband's house with her infant child and has no means of support, may maintain an action against her husband for a reasonable allowance for maintenance without coupling it with a prayer for divorce.

Another case held that where the husband and wife are living with his mother, and the wife and mother-in-law have a misunderstanding, which causes them to quit speaking and the wife to leave, the wife may be awarded separate maintenance since the conduct of the husband is such as to justify her leaving him. The court, in its opinion, held that it was the duty of the husband to provide a home for his wife under favorable conditions and that his failure to do so was such conduct as to justify her leaving him and being awarded separate maintenance without a decree of divorce.[3]

The same result in some other cases seems to be founded on the fact that the acts of the husband have not been of sufficient duration to warrant a divorce, therefore the wife may have separate maintenance without seeking a decree for divorce.[4] The cases, however, intimate that the decree of separate maintenance would not be granted if the husband's acts had continued for a sufficient time to warrant a decree of divorce under the divorce statutes.[5]

One of the reasons many courts have failed to abrogate the common law rule is that equity has no jurisdiction to decree a separate

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[1] Trotter v. Trotter, 77 Ill. 510 (1875); Shors v. Shors, 133 Iowa 22, 110 N. W. 16 (1906); Trevino v. Trevino, 63 Tex. 650 (1885).

[2] 38 Cal. 265 (1869).

[3] Gans v. Gans, 157 Ky. 776, 164 S.W. 96 (1914).

[4] Hill v. Hill, 203 Ky. 182, 261 S.W. 1115 (1924); Burke v. Burke, 270 Mass. 449, 170 N. E. 384 (1930).

[5] *Contra:* Stauffer v. Stauffer, 205 Mo. App. 515, 226 S.W. 40 (1920).

maintenance when it has no jurisdiction to grant a divorce. But in *Wohlfort v. Wohlfort*[6] the Kansas court said:

> "It has been argued that to grant alimony in an independent suit is equivalent to granting a divorce from bed and board, as it necessitates a determination of the question whether the wife has good cause for living separate from her husband; and that consequently, if a court lacks jurisdiction to decree a separation, jurisdiction to decide that question must also be wanting. The fallacy of this argument lies in the assumption that authority to pass upon the wife's right to a separate maintenance is dependent upon jurisdiction over the subject of divorce. . . . Consequently, there is no logical basis for the objection that jurisdiction to award alimony in an independent suit is dependent upon jurisdiction over the subject of divorce."[7]

This view has also been sustained in a few of the other state courts.[8] However, in suing for separate maintenance without asking for a divorce it must be shown that the husband was at fault and that the wife was not at fault in the situation which gives rise to her request for maintenance.[9] The fact that the wife fails to render her obligation of family services which is correlative with that of the husband to render support to her will not relieve the husband of his duty to support, where he has given her grounds for a divorce. That duty continues during the marital relation unless, for example, the wife wrongfully leaves the husband, or is guilty of adultery during the period of their cohabitation.[10]

The wife's right to maintain an action for separate maintenance when not coupled with a suit for divorce has been given by statute in some states, which take that means of abrogating the common law rule.[11]

In conclusion, it can be said that the majority rule allows a decree for separate maintenance only when the wife has grounds for a divorce and couples her prayer for separate maintenance with a prayer for divorce; however, a few states by decision, and others by statute, have given the wife seperate maintenance when she has grounds for a divorce but does not seek it. It is true that to give separate maintenance without divorce in effect puts a premium on

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[6] 116 Kan. 154, 225 Pac. 746 (1924).

[7] *Id.* at 748.

[8] Clisby v. Clisby, 160 Ala. 572, 49 So. 445 (1909); McCaddin v. McCaddin, 116 Md. 567, 82 Atl. 554 (1911); Lang v. Lang, 70 W. Va. 205, 73 S. E. 716 (1912).

[9] Rearden v. Rearden, 210 Ala. 129, 97 So. 138 (1923); McCaddin McCaddin, 116 Md. 567, 82 Atl. 554 (1911); Lang v. Lang, 70 W. Va. 205, 73 S. E. 716 (1912).

[10] State v. Kelly, 100 Conn. 727, 125 Atl. 95 (1924).

[11] CAL. CIVIL CODE (DEERING, 1941) sec. 137; FLA. STAT. (1941) sec. 65.09.

the wife holding out against the husband, but in many instances it will have the effect of bringing the parties together and preserving the marital status, for the husband will soon tire of paying separate maintenance and will seek a reconciliation with the wife, which follows the policy of the law. Since the minority rule will in many instances bring the parties back together and preserve the marital status the writer feels that it is the better rule.

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